No. 22032

IN THE

United States Court of Appeals For the Ninth Circuit

F. E. SMITH and V. K. SMITH,
Appellants,

v.

NEAL K. WARREN as District Director of Internal Revenue, for Washington,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

PREFACE

This brief has been prepared by using, as headings, as much as possible, the requirements set forth in Rule 18 of the United States Court of Appeals for the Ninth Circuit.

Wherever "Clerk's" followed by a number is used herein, it will be intend to refer to the number given to the particular paper by the District Court clerk in the "Certificate of Clerk, U. S. District Court to record on appeal."

Appellant will be referred to as "Plaintiff" and Appellees as "Defendant."

JURISDICTIONAL STATEMENT

A statement upon which it is contended that the District Court had jurisdiction may be summarized by quoting the Findings of Fact, Clerk's 12, as follows:

> "1. Plaintiff F. E. Smith is a Puget Sound pilot. Plaintiff V. K. Smith is his wife. Both plaintiffs are citizens of the United States and during the times material here plaintiffs were residents of the Northern King County, Camano Island, and Edmonds, Washington, which are all within the Northern Division of the Western District of Washington of the United States District Court.
>
> "2. Plaintiffs filed timely joint income tax returns for the years 1960 and 1961 with the defendant, Neal S. Warren, District Director of Internal Revenue for the State of Washington. After review and audit of these income tax returns, the Commissioner of the Internal Revenue assessed deficiencies against plaintiffs in the amount of $759.65 for 1960 and $647.57 for 1961. These deficiencies were the result of the Commissioner having disallowed plaintiff's deductions claimed for certain travel expenses, entertainment expenses, capital losses and alleged capital gains. Plaintiffs paid these deficiencies assessed, plus interest on June 24, 1964.
>
> "3. On May 27, 1965, plaintiffs filed claims for refund for the deficiencies assessed and collected for 1960 and 1961 in the respective amounts of $759.65 and $647.57. By a letter dated November 8, 1965, the Commissioner of Internal Revenue allowed a portion of these claims for refund and disallowed the remainder in the following proportions:

Year	Claimed	Allowed		Disallowed
		Tax	Interest	
1960	$ 759.65	$ 578.38	$ 109.66	$ 181.27
1961	647.57	532.30	69.01	115.27
	$1,407.22	$1,110.68	$ 178.67	$ 296.54

"The commissioner of Internal Revenue allowed all automobile expenses incurred by the plaintiffs in traveling to ports or ships outside the Seattle area together with a pro-rata allowance for depreciation. However, all automobile expenses and depreciation incurred in the Seattle area was disallowed as follows:

1960	$278.02
1961	$227.65"

STATEMENT OF FACTS

This action was commenced for the recovery of income taxes. Following the agreed pre-trial order (Clerk's 21, 21a), the only issue remaining was whether or not certain transportation expenses were deductible. The transportation expenses disallowed were those incurred by the plaintiff, a Puget Sound pilot, in traveling from taxpayer's home, in which he maintained an office, to assignments in the Seattle area and in returning from Seattle to taxpayer's home (office). (Par. 11 of Pre-Trial Order, Clerk's 21; Par. 5 of Findings of Fact, 13).

In Paragraph 5, Page 3 of the Findings, Clerk's 13, the issue raised was stated as follows:

> "5. As a result of the concessions made by the parties in the pre-trial order, the sole issue raised by the pleadings which remained for the Court to determine by trial was whether certain automobile expenses and depreciation incurred by the plaintiffs in the Seattle area are deductible under Sections 162 or 212 of the Internal Revenue Code for 1954."

Findings of Fact 6, 7, 8, 9, 10, and 11, in part, provide a concise statement of the facts involved and are repeated herein as follows:

"6. Plaintiff, F. E. Smith, (hereinafter referred to as plaintiff) is a Puget Sound pilot. He has a federal license issued by the United States Coast Guard as a first-class pilot on Puget Sound and adjacent inland waters and has a Master for steam and/or motor vessels of any tonnage on any ocean. He is a member of Local No. 8 of International Organization of Masters, Mates and Pilots. He is also a member of the Puget Sound Pilots Association, also known as Puget Sound Pilots. Except for a small amount of interest, all of plaintiff's income reported during the years in issue here was earned through this association.

"7. The Puget Sound Pilots Association also known as Puget Sound Pilots is an organization of approximately 30 members who pilot ships for a fee to and from various ports in the Puget Sound area. The fees charged for this service are regulated by state law. The area covered by the Puget Sound Pilots Association is the American waters east of Port Angeles, Washington, and includes March Point (Anacortes), 85 miles north of Seattle; Ferndale, 105 miles north of Seattle, Olympia, 60 miles south of Seattle; Tacoma, 25 miles south of Seattle; as well as Edmonds and Mukilteo which are closer to Seattle than the other ports.

"8. The Puget Sound Pilots Association also known as Puget Sound Pilots maintains a communications and dispatching office in the Exchange Building in downtown Seattle. Requests for pilots are received from ship owners or agents at this office. The association dispatcher then notifies the pilot whose name is next on the duty roster. This office also prepares and mails all statements for fees, collects all accounts receivable and pays all operating expenses. A conference room for Pilots' meetings is maintained at the Exchange Building office. In addition, the association also owns a pilot station on Ediz Hook located near Port Angeles. This station is equipped with two pilot boats, a communications center and facilities for food and lodging. It is from this station

that a pilot embarks on and disembarks from ships arriving from and departing to sea.

"9. In addition to these association services and facilities, *plaintiff also maintains an office in his home. In this residential office plaintiff spent time reviewing various written materials in regard to his duties as a Puget Sound ship pilot; in this connection, he received and reviewed materials in regard to Puget Sound waters and docking facilities. The materials maintained and received are described as*: (a) *Charts,* (b) *Army Engineer Blue Prints,* (*c*) *Current and Tide Tables,* (*d*) *light lists,* (*e*) *notice to mariner,* (*f*) *port series,* (*g*) *Coast pilot,* (*h*) *radar books. The Puget Sound Pilot Association dispatcher also notified plaintiff of his pilot assignments on his residential telephone. Plaintiff claimed an allocable share of his home expenses, including depreciation, as ordinary and necessary business expenses, and these expenses were allowed by the Commissioner. The parties have stipulated that, during the years involved, the plaintiff's residence in which this office was maintained was centrally located as to plaintiff's various assignments.*

"10. Depending upon the particular assignment involved, plaintiff may be assigned to report for duty either at some pier along the central Seattle waterfront (an area of approximately three and one-half to four statutory miles) or some other pier along Puget Sound which is outside the central Seattle waterfront. *Plaintiff furnished his own transportation to, from and between piloting assignments. He used public transportation, but he had to use a private automobile in conjunction with public transportation.* The plaintiff's wife drove him to and from and between work assignments. While plaintiff was on rotation, he was on call to furnish piloting services 24 hours a day.

"11. Plaintiff has claimed as income tax deductions all expenses which he incurred in reporting for his assignments as a pilot for ships....*The expenses which plaintiff incurred in traveling to and returning from*

assignments as a pilot for ships located beyond the central Seattle waterfront have already been allowed as income tax deductions by the Commissioner and accordingly are not further discussed in these findings." (Emphasis mine)

SPECIFICATION OF ERRORS

(1) The court erred in entering its Findings of Fact (clerk's 12) and in rejecting the Objections to Findings of Fact and Conclusions of Law of the plaintiff (clerk's 11). The court erred in entering the following portion of Findings of Fact number 11 which reads as follows:

> ". . . Expenses which plaintiff incurred in traveling from his home to assignments as a pilot for ships located within the central Seattle waterfront and expenses which plaintiff incurred in returning from assignments as a pilot for ships located within the central Seattle waterfront to his home are non-deductible personal expenses. The Commissioner of Internal Revenue accordingly properly disallowed these claimed deductions...." (As a reference, see Findings of Fact, Clerk's No. 12, paragraph 11; Objections to Findings of Fact and Conclusions of Law, Clerk's No. 11.).

The foregoing excerpt from Findings of Fact No. 11 should have read as follows:

> "Expenses which plaintiff incurred in traveling from his home to assignments as a pilot for ships located within the central Seattle waterfront and the expenses which plaintiff incurred in returning from assignments as a pilot for ships located within the central Seattle waterfront to his home are ordinary and necessary expenses incurred by plaintiff as an independent contractor." (As a reference, see Objections to Findings of Fact and Conclusions of Law, Clerk's No. 11.).

(2) The court erred in entering its Conclusion of Law No. 3, which reads as follows:

> "3. The expenses which plaintiff incurred in travel from his home to assignments as a pilot for ships located within the central Seattle, waterfront and the expenses which plaintiff incurred in returning from assignments as a pilot for ships located within the central Seattle waterfront to his home are non-deductible personal expenses under Section 262 of the Internal Revenue Code of 1954. *Steinhort v. Commissioner*, 335 Fed.2d 496 (C.A. 5, 1964) (Clerk's 12)."

The said Conclusion of Law should have read as follows:

3. The expenses which plaintiff incurred in travel from his home to assignments as a pilot for ships located within the central Seattle waterfront and the expenses which plaintiff incurred in returning from assignments as a pilot for ships located within the central Seattle waterfront to his home are ordinary and necessary expenses under Sections 162 and 212 in the Internal Revenue Code and in accordance with *Hulme, et al. v. U. S.*, Northern District, California, Southern Division, Civil No. 41033, 6-3-65, 65-2 U.S.T.C. 96,295. (Objections to Findings of Fact and Conclusions of Law, Clerk's No. 11.)

As both of these errors are related, they will be argued as one argument, under the category that the court should have found that the transporation to and from central Seattle waterfront to plaintiff's home were ordinary and necessary expenses under Sections 162 and 212 of the Internal Revenue Code.

Statutes Involved

It is submitted that the expenses in this case fall within the following statutory provisions of the Internal Revenue Code, 1954:

> "Sec. 162 Trade or Business Expenses (a): There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> "...(2) traveling expenses (including the entire amount expended from meals and lodgings) while away from home in the pursuit of a trade or business. . . . 26 U.S.C.A. 162—
>
> "Sec. 212. Expenses For Production Of Income. In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—(1) for the production or collection of income..." 26 U. S. C. A. 212.
>
> "Sec. 167. Depreciation.
>
> "(a) There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear. . .
>
> "(1) of property used in the trade or business, or
>
> "(2) of property held for the productions of income." 26 USCA 167

ARGUMENT FOR APPELLANTS

1. Summary

The issue in this case is whether or not the transportation expenses of the plaintiff in traveling from his office, which is located in his home, to and from Seattle, are ordinary and necessary business expenses.

There are three cases involving transportation expenses claimed by a ship pilot. Generally speaking, the plaintiff urges the court to follow the case of *Hulme v. U.S.*, Northern District of California, Southern Division, Civil No. 41033, 6-3-65, 65-2 U.S.T.C. 96,205, 16 A.F.T.R. 2d 5084, hereinafter called *Hulme* case. On the other hand, the defendant relies upon the following cases:

Heuer v. Commissioner, 32 T.C. 947, affirmed 283 F.2d 865, (5th Cir.), hereinafter called *Heuer* case,

Steinhort v. Commissioner, P. H. Memo. T.C. Par. 62,233, affirmed 335 F.2d 496, 64-2 USTC 93,763, (5th Cir.), hereinafter called *Steinhort* case.

The defendant contends that the expenses at issue fall within section 262, of the 1954 Internal Revenue Code, which section disallows personal expenses as deductions.

As to the ordinary and necessary requirements set forth above, the plaintiff testified on page 28 of the transcript of Proceedings:

"Q. Is it ordinary to use your automobile in transportation as far as travel from your office to various points of assignment?

"A. Yes, it is.

"Q. Is it necessary to use it?

"A. I believe so."

See also the testimony of pages 26 and 27 of the transcript of Proceedings as follows:

"Q. Then how do you get to the various places where you are assigned to? What means of transporta- do you use?

"A. I use my automobile and public transportation where available.

. . .

"Q. Are there any of these places that you were assigned to not accessible by public transportation?

"A. Yes, sir, some of them are."

The above testimony, as to the necessity for an automobile, is set forth in the following excerpt from Findings of Fact No. 10, quoted in full above, Clerk's 12:

> "Plaintiff furnished his own transportation to, from and between piloting assignments. He used public transportation, but he had to use private automobile in conjunction with public transportation."

Besides the above testimony, the parties had stipulated that:

> "...during the year's involved, the plaintiff's residence in which this office was maintained was centrally located as to plaintiff's various assignments," Findings of Fact No. 9, Clerk's No. 12, quoted in full above.

It is arbitrary for the defendant in this case to in effect tell the plaintiff how he should conduct his business. It should be noted that the defendant allowed some of the transportation expenses as indicated in the following excerpt from paragraph 11, of the Findings of Fact, Clerk's 12:

> "The expenses which plaintiff incurred in traveling to and returning from assignments as a pilot for ships located beyond the central Seattle waterfront have already been allowed as income tax deduction by the commissioner and accordingly are not further discussed in these findings."

Because the pilots maintained an office in Seattle, is no reason for making this arbitrary allocation. It would be an entirely different matter of the evidence were that the plaintiff had to go to the Seattle office before going out on any assignments. The evidence was to the contrary. His visits to the Seattle office were in-frequent. On page 36 of the Transcript of proceedings, the plaintiff testified as follows:

"(By Mr. Ranquet)

"Q. If the Puget Sound Pilot office located at 2208 Exchange Building were used as the office in your home is used, would there have to be some changes made there?

"A. It would have to be much larger to take care of twenty-eight men to maintain the equipment that each pilot has, and I assume he has in his office. It would have to be larger.

"Q. Are you able to concentrate more at home than you would be if you had an office in the Exchange Building?

"A. I believe so, yes, Sir.

"Q. Have you indicated that the office at 2208 Exchange Building did not receive the same material as you had at home; is that correct?

"A. That is correct, Sir."

While an application of the facts to the statute clearly show that the deductions are allowable, the court decisions in the Ninth Circuit clearly support the plaintiff.

2. The *Hulme* Case Is Dispositive of This Case

The *Hulme* case, involving a ship pilot in San Francisco, is identical to this case, with some insignificant

differences. In that case, the plaintiff pilot also maintained an office in his home and commissioner had disallowed:

> ". . . a portion of the travel expenses claimed in the returns, on the basis that automobile expenses incurred in traveling from home to job assignments and return represented personal commuting expenses and therefore not deductible under Section 262 of the Internal Revenue Code of 1954. . . ."
>
> Page 96205 of 65-2 USTC.

The common area where the *Hulme* case and this case meet is in the fact that in both cases the pilots had offices in their homes. In this case, Finding of Fact No. 9, Clerk's 12, (quoted above) which provides as follows:

> "9. In addition to these association services and facilities, plaintiff also maintains an office in his home. In this residential office plaintiff spent time reviewing various written materials in regard to his duties as a Puget Sound ship pilot; in this connection, he received and reviewed materials in regard to Puget Sound waters and docking facilities. The materials maintained and received are described as: (a) Charts, (b) Army Engineer Blue Prints, (c) Current and Tide Tables, (d) light lists, (e) notice to mariner, (f) port series, (g) Coast pilot, (h) radar books. The Puget Sound Pilot Association dispatcher also notified plaintiff of his pilot assignments on his residential phone. Plaintiff claimed an allocable share of his home expenses, including depreciation, as ordinary and necessary business expenses, and these expenses were allowed by the commissioner. The parties have stipulated that, during the years involved, the plaintiff's residence in which this office was maintained was centrally located as to plaintiff's various assignments."

The plaintiff, in uncontradicted direct testimony, discussed at length what he did in his home. The foregoing Finding of Fact was amply supported. See the Transcript of Proceeding, pages 13, 14, 15, 16, 17; see picture of office, Exhibit 5. The foregoing Finding of Fact and evidence should be compared to Findings of Fact No. IX, in the *Hulme* case, 65-2 USTC 96 206:

> "IX. During the years involved herein, plaintiff's principal place of business and his residence were at 79 Summit Avenue, San Rafael, California. He maintained his office in connection with his piloting activities in one room of his home. His occupation required him to do a certain amount of office work. His office contained all of his business equipment in the way of office furniture, desk, chairs, filing cabinets, typewriter and typewriter stand, adding machine, hydrographic literature, business records stationary and business forms, nautical charts and various literature, notices and bulletins pertaining to piloting. Plaintiff had a telephone listed in his name which was used exclusively for business purposes. The second telephone to the house was listed in his wife's name. Plaintiff's business telephone was connected to a 24-hour answering service that received his business calls when no one was home."

While the *Hulme* case was a district court case, it is noted that the government did not appeal the case. In the absence of such an appeal, the doctrine of *stari decises* should be applied in this case. Based upon the *Hulme* case, the decision of the district court in this case should be reversed.

3. The Ninth Circuit Cases Support *Hulme* and This Case

Besides the *Hulme* case, the plaintiff in his argument, cited the following cases: *Rice v. Riddell*, 179 F. Supp.

576 (S.D. Cal. 1959); *Charles Crowther,* 269 F.2d 292, 28 T.C. 1293, hereinafter called the *Crowther* case; *Mathews v. Commissioner,* 310 F.2d 98, 36 T.C. 483, hereinafter called the *Mathews* case. All of the above cases, decided in the Ninth Circuit, should be followed.

The case of *Rice v. Riddell, supra,* is particularly pertinent. In that case, the plaintiff musician transported his tuba and bass violin in his automobile from his home to various assignments. He claimed this as transportation expenses and the court allowed the deduction. In allowing the deduction, the court met the argument that the expenses should have been disallowed as commuting expenses because the starting point was the taxpayer's residence, as indicated by the following excerpt from page 578 of 179 Federal Supplement:

> "There has been some argument over the fact that Mr. Rice's business was operated from his 'home.' The fact that the premises served plaintiff in a dual capacity does not destroy the right to claim the existence of either character of the address. The evidence shows that Mr. Rice's home was also his business headquarters."

The Ninth Circuit has consistently allowed transportation expenses contrary to the position of the Commissioner. This is aptly summarized on page 156 of Volume 49 of Virginia Law Review as follows:

> "The 9th Circuit and the Commissioner have come into conflict on virtually every front of the travel deduction problem discussed heretofore. Rejecting the 'tax home' concept in Wallace, the 9th Circuit continued in Harvey to repudiate the position of the service that 'a home' will always move whenever an employee's job is deemed indefinite rather than temporary. Finally, in Hartsell the court saw fit both

> to construe 'home' to mean residence and to strenghten this first thesis be requiring the taxpayer to mitigate his travel expenditures by either moving his home to an available area in proximity to his post of duty or losing a proportionate part of the deduction."

Further, the *Crowther* and the *Mathews* cases, *supra*, indicate the conflict between this court and the tax court. Further, the cases strongly indicate a conflict between the tax court and the Ninth Circuit in the area of the transportation expenses.

The foregoing analysis show that the law in Ninth Circuit, on transportation expenses, clearly support the *Hulme* case and the plaintiff. Again, applying the doctrine of *stari decisis*, the plaintiff should be granted judgment for the transportation expenses between his office (home) and Seattle.

4. The Court Erred in Rejecting the *Hulme* Case

In all due respect to the District Court, it erred in rejecting the *Hulme* case. In his opinion, set forth on page 69 of the Transcript of Proceedings, starting on line 8, the court stated as follows:

> "(1) That unlike Captain Hulme in the San Francisco U.S. District Court case, plaintiff Captain Smith did receive all his business assignments and income from or through the Pilots Association of which he was a member.
>
> "(2) That as of material facts this case is more like the *Steinhort* case in the 5th Circuit than *Hulme* case in the District Court at San Francisco, or any other case cited by counsel in their respective arguments."

Based upon the above, the trial court evidently made a distinction in the *Hulme* case and this case based upon the fact that the plaintiff herein belonged to a pilot association while in the *Hulme* case, the pilot did not belong to a pilot association.

While there is no argument but what there is such a distinction, that is that Captain Smith belonged to an association but Captain Hulme did not, this distinction is insignificant.

The reason for the existence of the Puget Sound Pilots Association and the function of it shows that there is no distinction. The reason for the existence of the organization is set forth on pages 31 and 32 of the Transcript of Proceedings, testimony of the plaintiff:

"Q. Do you have the knowledge as to why the Puget Sound Pilots were formed?

"A. Yes, Sir, I do.

"Q. What is that knowledge?

"A. That knowledge is that it was formed for the protection of the shipping of this area, the shipping, crews, cargo, property, life and the small vessel and of other vessels operating on Puget Sound. It was formed by the laws of the Statute of the State of Washington."

A recital preceding the Washington statute set forth on page 19 of Exhibit 1, Board of Pilotage Commissioners Rules and Regulations, State of Washington, regulating pilots, provides a guideline of the duties of the pilot:

> "An act for the protection of shipping and the safety of human life and property, regulating pilots and pilotage of the waters of Puget Sound and adjacent inland waters. . . ."

Because the plaintiff utilizes a system under the state law whereby he carries out his duty to protect the safety of human life and property, he should not be penalized by a loss of deduction.

Apart from the plaintiff carrying out his duty in utilizing an organization does not change this case from the *Hulme* case. That the plaintiff still has to use his office at home and has limited use of the office maintained by the Puget Sound Pilots Association is indicated by the following excerpts from the Transcript of the Proceedings, starting on page 33:

"Q. Let me ask you this. Is the office in 2208 Exchange Building available for the same use as the office in your home?

"A. They don't have the equipment I have.

"Q. If the Puget Sound Pilot office located at 2208 Exchange Building were used as the office in your home is used, would there have to be some changes made there?

"A. It would have to be much larger to take care of 28 men to maintain the equipment that each pilot has, and I assume he has in his office. It would have to be larger.

"Q. Are you able to concentrate more at home than you would be if you had an office in the Exchange Building?

"A. I believe so, yes, Sir.

"Q. You have indicated that the office at 2208 Exchange Building did not receive the same materials you have at home; is that correct?

"A. That is correct, Sir."

In short, in spite of the plaintiff belonging to Puget Sound Pilots, the plaintiff is still an independent con-

tractor and this is the same as the Captain in the *Hulme* case. The case of *Guy v. Donald,* 203 U.S. 399 (1906), dismissed the function of a pilot association as being very insignificant. In the *Guy* case, the owners of a steamer sued the Virginia Pilot Association for the negligence of one of its members. In rejecting the claims, Justice Holmes made the following pertinent comment in regard to the activities of the Pilot Association:

> "All that there is upon which to base a joint liability is that the pilots, instead of taking their fees as they earn them, accomplish substantially the same result by mingling them in the first place, and then, after paying expenses distributing them to those on the active list according to the number of days they respectively have been there. Apart from the possible slight difference between the proportion of days on the active list and days of active service, the case is the same as if each pilot kept his fees, merely contributing to keep up a common office from which his bills might be sent out and where a few details of common interest could be attended to. In the latter case this suit hardly would have been brought. The distinction between it and the one at bar is not great enough to justify a different result. See the City of Dundee, 47 CCA 581, 108 Fed. 679, 684, 103 Fed. 696. The second and third questions certified are answered 'No.'"

In the case of *Mobile Bar Pilots Associaton v. Commissioner,* 97 F.2d 696, the Commissioner had argued that the Pilots Association, which fulfilled the same duties as herein, was a taxable entity. The associaton, as petitioner, petitioned the court and the court found that the association was not a taxable entity. In identifying the respective duties of the pilot and the association, the court made the following cogent comments:

"Pilot associations have existed at all ports in civilized countries from time immemorial. It is not necessary for a man to be a member of an association to practice his profession but in the nature of things it would be impossible for him to operate alone. He must meet vessels beyond the bar in all kinds of weather and maintain boats of sufficient size and seaworthiness to permit him to do so. This would be impossible without an organization as the cost would be prohibitive to a single individual.

"For the convenience of shipping it is necessary that headquarters of some kind be maintained at each port so that the pilot can be called when needed. It is necessary for the pilots to have someone to look after their business affairs such as collecting their fees as it would be impracticable for the pilot to do that personally.

"Pilotage is personal service by an individual for which he has a maritime lien on the vessel. The Queen, 9 Cir., 206 F. 148. A pilot is the servant of the owner of the vessel who is responsible to third persons for his negligence or want of skill. *Sherlock v. Alling*, 93 U.S. 99, 23 L.Ed. 819. But an association of which the pilot is a member, similar to petitioner, is not responsible for his acts. *Guy v. Donald*, 203 U.S. 399, 27 S. Ct. 63, 51 L.Ed. 245."

The above case provides an excellent analysis for the existence of Pilot Associations.

As in the *Mobile Bar Pilots* case, the Puget Sound Pilots own facilities in this case; among other things, it owns two boats and a pilot station in Port Angeles. Findings of Fact 8, Clerk's 12. In the *Hulme* case, there was no showing that Captain needed any of these facilities, that is boats or facilities. This means that the plaintiff in this case renders a more extensive service. In view of the additional services rendered, the plaintiff has more need for transportation than in the *Hulme* case.

5. The *Steinhort* Case Does Not Apply and Can Be Distinguished

The court in this case relied upon the *Steinhort* case. On page 69 of the Transcript of Proceeding, the court stated in its opinion, in part:

> "That as to the material facts this case is more like the *Steinhort* case in the 5th Circuit than the *Hulme* case of the District Court at San Francisco, or any other case cited by counsel in their respective arguments."

The *Steinhort* case can be distinguished from this case and the *Hulme* case on the basis that the taxpayer in *Steinhort* did not establish an office or show that he used an office in connection with his business activities.

If the government argues that the transportation expenses in this instance are commuting expenses, it overlooks an essential factor and that is that the taxpayer's office, located in his home, amounts to his first business stop. In other words, commuting, if any in this case, consists of the taxpayer walking from any other part of his home to his office. When he goes from the office to his assignment to pilot ships, he is traveling between two established places of business. This would be in accordance with the rule cited in *Steinhort,* on page 93, 769, of the C.C.H. citation:

> "For that matter, as a proposition of logic alone, one could argue persuasively that a worker having places A, B, and C as regular destinations for the day's work, is going from home to B and then to C even though it is done after first stopping at A and C respectively. Yet the law neither is, nor permits itself to be carried away by such logic. It recognizes, first, there where there are two or more established

> places of business, all costs of transportation between them is an ordinary and necessary business expense."

Applying the above rule, the travel from what part of the house to the office is the equivalent of travel to A and the travel from the office to Seattle would be the equivalent of travel from A to B and therefore deductible.

The argument herein made as to *Steinhort* would apply equally to the *Heuer* case.

6. The *Steinhort* Case, in the Fifth Circuit, Is in Conflict With the Ninth Circuit Cases

While the argument has been made that the *Steinhort* and the *Heuer* cases can be distinguished from the *Hulme* case and from this case, an equally good argument is that the *Heuer* and *Steinhort* cases were decided in the 5th Circuit and are directly in conflict with the *Hulme* case in the 9th Circuit. In the *Heuer* case, on page 951, of 32 T.C., in the Tax Court, as support for the court's position that certain travel expenses were non-deductible, the court quoted the Tax Court case of *Charles Crowther,* 28 Tax Court 1293. In the *Crowther* tax court case, transportation expenses were disallowed by the Tax Court; this was reversed by this court; see *Crowther v. Commissioner,* 269 F.2d 292 (9th Circuit C.R. 1959).

As support for it's position in the *Steinhort* case, the Tax Court on the last page of the opinion cited Tax Court case of *Charles Crowther,* 28 Tax Court 1293, and Tax Court case of *Edward Mathews,* 36 T.C. 483; again, both of these cases were reversed by the 9th Circuit; as indicated above, the *Crowther* case was reversed in the 9th Circuit, 269 F.2d 292; the Tax Court

decision in the *Mathews* case was reversed by the 9th Circuit, 210 F.2d 98.

In other words, the Fifth Circuit followed Tax Court cases that in turn relied upon Tax Court cases that had been reversed in the Ninth Circuit.

In view of the conflict between the *Steinhort* and *Heuer* cases, on the one hand, and the *Hulme* case on the other, this Court should resolve the conflict. In resolving the conflict the Court should find for the plaintiff in this case. In Finding for the plaintiff, the Court would be following the *Hulme* case, *Rice* case, *Mathews* case and the *Crowther* case.

SUMMARY

By way of summary, it is submitted that the District Court should be reversed and judgment should be rendered for the plaintiff for the following reasons:

a. The court erred in applying the *Steinhort* case instead of the *Hulme* case;

b. The court erred in following the *Steinhort* case in the 9th Circuit;

c. The court erred in making the tax home of the plaintiff Seattle instead of his residence where he maintains an office.

Respectfully submitted,

JOHN RANQUET,
Attorney for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN RANQUET
Attorney for Appellant

APPENDIX OF EXHIBITS

(8) List of Exhibits With Reference to Page Number to Transcript of Proceedings.

Exhibit No.	*Description of Exhibit*	*Page Reference*		
		Identified	*Offered*	*Admitted*
1.	Regulations booklet issued by Department of Labor and Industries	7	8	8
2.	Map for Puget Sound Country	9	9	9
3.	Geological Survey of Puget Sound Country	9	10	10
4.	Partial Disallowance by Defendant	37	37	38
5.	Picture of Plaintiff's Office at 814 Dayton, Edmonds, Washington	38	38	39
6.	Picture of Port Angeles Pilot Station	40	40	40
7.	Audit report of Defendant	41	41	41
8.	Partnership Tax Return for 1960 for Puget Sound Pilots	42	42	42
9.	Partnership Tax Return for 1961 for Puget Sound Pilots	42	42	42
10.	By-Laws of Puget Sound Pilots	42	43	43
11.	Schedule of Tariffs	44	44	44
12.	Tax Return for Plaintiff—1960	45	45	45
13.	Tax Return for Plaintiff—1961	45	45	45
14.	Claim for Refund by Plaintiff—1960	46	46	46
15.	Claim for Refund by Plaintiff—1961	46	46	46